STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 12, 2002
v	No. 217052 Clare Circuit Court
JOHN RODNEY MCRAE, Defendant-Appellant.	LC No. 98-001151-FC ON REMAND

Before: Talbot, P.J., and Hood and Gage, JJ.

PER CURIAM.

This case is before us for the second time. In our prior opinion, we affirmed defendant's conviction of first-degree premeditated murder, MCL 750.316(1)(a). *People v McRae*, unpublished opinion per curiam of the Court of Appeals, issued 01/12/2001 (Docket No. 217052). In that appeal, defendant challenged the trial court's denial of his motion to suppress evidence of a statement he allegedly made to his former neighbor, who was employed as a reserve deputy sheriff, on the grounds that it violated his right against compelled self-incrimination and his right to counsel under the United States and Michigan constitutions.[1] We concluded that even if the trial court erred in admitting the statement, the error was harmless beyond a reasonable doubt in light of the evidence presented at trial. Defendant filed an application for leave to appeal with the Supreme Court. In lieu of granting leave to appeal, the Supreme Court determined that if the trial court erred in this regard, the error was not harmless, and remanded the matter for our consideration whether there was error. *People v McRae*, 465 Mich 874 (2001). Having reviewed the case in accordance with the Supreme Court's directive, we find no error and affirm.

The alleged statement that defendant moved to suppress was made during a conversation with his former neighbor, Dean Heintzelman, at the Clare County jail where defendant was incarcerated awaiting trial. Heintzelman was employed as a reserve officer for the Clare County Sheriff's Department. Heintzelman had been defendant's neighbor when defendant lived in the area years ago, and Heintzelman described him as a friend that he knew "fairly well" at that time. Heintzelman was aware that defendant was charged with first-degree murder and was being held

[1] Defendant also raised other issues which we found to be without merit and on which the Supreme Court denied leave to appeal.

at the jail. Heintzelman learned from his mother, who was also a reserve officer, that defendant wanted to see him on the basis of a conversation she had had with defendant's wife, and it was his understanding that defendant wondered why Heintzelman had not come to see him. Although Heintzelman did not know why defendant wanted to see him, he believed that defendant "just [ ] wanted company."

One night after Heintzelman had finished transporting a prisoner, he told the officer on duty that defendant had been asking to see him, and Heintzelman asked the officer to take him back to defendant's cell. Heintzelman was wearing his sheriff's uniform. Heintzelman remained outside defendant's cell. He and defendant shook hands and talked about their families. Heintzelman asked defendant about his son, and defendant showed Heintzelman pictures of his son's wife and baby. At some point in the conversation, Heintzelman asked defendant about his involvement in the charged offense. Defendant did not answer. They continued to talk about defendant's son. Again Heintzelman asked defendant, "[D]id you do it?" According to Heintzelman, defendant hung his head and responded, "Dean, it was bad. It was bad." That was the end of their discussion and Heintzelman had no further contact with defendant. Heintzelman later relayed the content of their conversation to another officer.

The prosecution notified defendant that it intended to introduce evidence of the statement at trial. Defendant moved to suppress the statement on the grounds that its admission violated his constitutional rights to counsel and against compelled self-incrimination because the statement was elicited without the presence of counsel or the requisite warnings. The prosecution argued that defendant waived his rights by requesting that Heintzelman come see him and also that Heintzelman's employment as a reserve officer was irrelevant in the context of their meeting, which was a casual conversation between former neighbors.

At the *Walker*[2] hearing, the trial court heard testimony about the circumstances surrounding Heintzelman's conversation with defendant. Heintzelman testified that he had been defendant's neighbor before defendant moved out of the area in 1987, and that at that time they were good friends. Heintzelman learned from his mother that she had spoken with defendant's wife, Barbara McRae, and Barbara indicated that defendant would like to see Heintzelman. According to Barbara, defendant "wanted to have a friendly conversation with our neighbors." Barbara claimed to be unaware that Heintzelman was associated with the Sheriff's Department. Heintzelman testified that he did not give defendant *Miranda*[3] warnings because they were "talking like friends."

Defendant testified at the hearing. When questioned whether he had requested that Heintzelman visit him in jail, defendant equivocated, "Not exactly." Defendant denied knowing that Heintzelman was associated with the sheriff's department. Defendant stated that Heintzelman immediately asked him: "John, John, now did you do it? Didn't you do it? Do you remember what happened? Did you forget it?" Defendant "was trying to be very cautious as to what [he] said." Defendant testified that he shook his head and said, "No, not anything at all like they're trying to make it out to be." They then proceeded to talk about their families.

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant testified that he had previously been given *Miranda* warnings, and that he had invoked his right to remain silent. At the time of the conversation, defendant was represented by counsel. Previously, defendant had told the police that he did not wish to answer any questions and he wished to consult with an attorney. He testified that he never communicated to the sheriff's department that he had changed his mind and that he wanted to talk about the matters that brought him there.

Kerry Kocsis was in the same wing of the jail as defendant and overheard the conversation between defendant and Heintzelman. He testified that they talked about defendant's son, and defendant's son's children, and how defendant was doing in the jail. Kocsis heard Heintzelman asked defendant "Did you do it?" Kocsis first stated that defendant did not answer. Later he said that defendant responded "No."

At the conclusion of the hearing, the trial court made the following findings and ruling:

> . . . [I]t seems pretty evident to the fact that [Heintzelman] was back there at the request of the Defendant. He wanted to talk to him. The Defendant did. And so he's the one who initiated the conversation. And the fact that it got into culpability relative to this particular situation does not mean or does not change the fact as to what the requirements of the law are as far as what the police officer had to do.

The trial court determined that *Miranda* warnings were not required and denied defendant's motion to suppress the statement.[4]

We review a trial court's findings of fact regarding a motion to suppress evidence for clear error, and review the trial court's ultimate decision on the motion de novo. *People v Williams*, 240 Mich App 316, 319; 614 NW2d 647 (2000); *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999). See also MCR 2.613(C). Clear error exists if we are left with a definite and firm conviction that a mistake has been made. *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000); *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84

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[4] We note as an aside that defendant's motion to suppress was somewhat problematic, inasmuch as defendant sought to challenge the constitutionality of the circumstances surrounding the elicitation of a statement that defendant did not admit to making. The *Walker* hearing testimony offered four versions of what transpired between Heintzelman and defendant. Heintzelman testified that when asked about his culpability, defendant said: "Dean, it was bad. It was bad." This is the alleged statement defendant sought to have suppressed. However, defendant testified that he responded to Heintzelman by saying that it was "not anything at all like they're trying to make it out to be." Kocsis gave conflicting testimony; Kocsis first stated that defendant said nothing in response to Heintzelman's question, but later testified that defendant said simply, "No." The trial court proceeded to rule on the motion despite defendant's contradictory testimony on this point at the hearing. We now engage in the somewhat paradoxical task of reviewing a ruling on a motion to suppress when defendant's own testimony contradicts that he made the statement that he sought to have suppressed.

(1997). "An appellate court must give deference to the trial court's findings at a suppression hearing." *People v Cheatham*, 453 Mich 1, 29; 551 NW2d 355 (1996).

"In *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the United States Supreme Court created a set of prophylactic safeguards to insure protection of the Fifth Amendment right to be free from compelled self-incrimination during custodial interrogation." *Cheatham*, *supra* at 10. "[T]he police must advise a suspect before custodial interrogation that the suspect has the right to remain silent, that anything the suspect says may be used against him, and that the suspect has a right to the presence of retained or, if indigent, appointed counsel during questioning." *People v Dennis*, 464 Mich 567, 572-573; 628 NW2d 502 (2001). See Const 1963, art 1, § 17. "*Miranda* protects defendants against governmental coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that." *Cheatham*, *supra* at 11, quoting *Colorado v Connelly*, 479 US 157, 170; 107 S Ct 515; 93 L Ed 2d 473 (1986).

It has become axiomatic that *Miranda* warnings need only be given in cases involving custodial interrogations. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995); *People v Hoffman*, 205 Mich App 1, 8; 518 NW2d 817 (1994). This Court has recognized that "*Miranda* must be strictly enforced, but only in 'those types of situations in which the concerns that powered the decision are implicated.'" *Id.*, quoting *Berkemer v McCarty*, 468 US 420, 437; 104 S Ct 3138; 82 L Ed 2d 317 (1984). Accordingly, in the case at bar the issue to be resolved is whether defendant was subjected to custodial interrogation to trigger the requirements of *Miranda*. *Anderson*, *supra* at 532. "Custodial interrogation" means questioning initiated by law enforcement officers after a person has been taken into custody. *Anderson*, *supra*, citing *Illinois v Perkins*, 496 US 292, 296; 110 S Ct 2394; 110 L Ed 2d 243 (1990). "'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." *Anderson*, *supra*, quoting *Rhode Island v Innis*, 446 US 291, 300; 100 S Ct 1682; 64 L Ed 2d 297 (1980). See *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001).

The Sixth Amendment to the United States Constitution as well as the Michigan Constitution guarantee the right to counsel. US Const Am VI; Const 1963, art 1, § 20. The Sixth Amendment right to counsel attaches at or after the initiation of adversary judicial proceedings against the defendant, *People v Johnson*, 215 Mich App 658, 664; 547 NW2d 65 (1996), and applies to all critical stages of the prosecution. *People v Crusoe*, 433 Mich 666, 685; 449 NW2d 641 (1989). "A critical stage of the proceedings includes government efforts to elicit information from the accused concerning the charged crime." *People v Riggs*, 223 Mich App 662, 677; 568 NW2d 101 (1997) (Smolenski, J.), citing *Michigan v Jackson*, 475 US 625, 630; 106 S Ct 1404; 89 L Ed 2d 631 (1986).

In the case at bar, it is undisputed that at the time of Heintzelman's conversation with defendant, defendant was in custody for purposes of *Miranda*. Nor is it disputed that Heintzelman did not give defendant *Miranda* warnings. Also, because formal proceedings had commenced, defendant's Sixth Amendment right to counsel had attached. *Johnson*, *supra* at 664.

The trial court correctly identified the threshold issue, i.e., "why was Mr. Heintzelman back there. Was he back there as a police officer on police duties at that point in time, or was he

back there at the request of the Defendant[?]". This is the relevant inquiry in this case because "constitutional protections apply only to governmental action." *Anderson*, *supra* at 533. "A person who is not a police officer and is not acting in concert with or at the request of the police is not required to give *Miranda* warnings before eliciting a statement." *Id.*

Defendant advances arguments that are interesting but unsupported by the record. Defendant argues that Heintzelman's employment as a reserve sheriff's deputy placed him in the status of a police officer for purposes of his conversation with defendant despite Heintzelman's claim that he visited defendant at defendant's request and on the basis of their friendship. Although defendant asserts that Heintzelman visited defendant "during the course of his duties as a reserve police officer," the record establishes only that Heintzelman visited defendant after he had finished transporting a prisoner, he thought it was a good time to visit defendant, and defendant had been asking to see him. Although the nature of Heintzelman's duties as a reserve officer is pertinent to this determination, see, e.g., *Anderson*, *supra*; *People v Robledo*, 832 P 2d 249 (Colo, 1992), the record is void of any evidence regarding the specific duties the job entails other than the transportation of prisoners. The record provides no indication of whether the position comprises any investigatory responsibilities. See *Anderson*, *supra* at 534.

Nor does the record support defendant's contention that Heintzelman used his friendship with defendant to elicit an incriminating statement or that Heintzelman was seeking information at the behest of investigating officers. On the contrary, the evidence supported the trial court's finding that Heintzelman visited defendant at defendant's request. Although the testimony differed regarding the point in the conversation at which Heintzelman inquired about defendant's involvement in the charged offense, Heintzelman, Kocsis, and defendant all testified that the conversation included talk of their families and defendant's son, thus suggesting the social aspect of the visit, as Heintzelman testified. In short, the record is void of any suggestion of the type of police coercion against which *Miranda* was intended to protect. *Cheatham*, *supra* at 10-11 ("The stated goal of *Miranda* is to protect against the inherently coercive nature of custodial interrogation.")

Defendant relies on cases involving security guards or off-duty police officers and addressing whether they are state actors for purposes of *Miranda*. None of the cases defendant cites address circumstances similar to those presented here in which the statement at issue was made in the context of a conversation between former friends which, as the trial court in this case found, was initiated by the defendant. Thus, they are not helpful to the resolution of the matter before us.

We conclude that the trial court did not clearly err in its findings, and that the court did not err in denying defendant's motion to suppress his statement.

Affirmed.

/s/ Michael J. Talbot
/s/ Harold Hood
/s/ Hilda R. Gage